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**In the Supreme Court of the United States**

OCTOBER TERM, 1990

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**MICHAEL A. HARTMAN AND BENJAMIN H. WOODS,**  
PETITIONERS

v.

**UNITED STATES OF AMERICA**

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**ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES OF APPEALS FOR  
THE THIRD CIRCUIT**

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**  

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### QUESTIONS PRESENTED

1. Whether the "pattern of racketeering activity" element of the RICO statute is unconstitutionally vague.

2. Whether the evidence established the requisite nexus between the charged enterprise and petitioners' predicate acts of racketeering.



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## **OPINION BELOW**

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 915 F.2d 854.

## **JURISDICTION**

The judgment of the court of appeals was entered on October 1, 1990. The petition for a writ of certiorari was filed on January 2, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## **STATEMENT**

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioners were convicted on one count of participat-

ing in the affairs of an enterprise through a pattern of racketeering activity, in violation of the RICO statute, 18 U.S.C. 1962(c). In addition, Woods was convicted on two counts of conspiracy to defraud the United States, in violation of 18 U.S.C. 371; six counts of extortion, in violation of the Hobbs Act, 18 U.S.C. 1951; five counts of income tax evasion, in violation of 26 U.S.C. 7201; and two counts of making false statements on an income tax return, in violation of 26 U.S.C. 7206(1). Hartman also was convicted on one conspiracy count and one count of making a false statement on an income tax return. Woods was sentenced to eight years' imprisonment, to be followed by three years of supervised release. Hartman was sentenced to 25 months' imprisonment, to be followed by three years of supervised release, and a \$40,000 fine. The court of appeals affirmed. Pet. App. 1a-22a.

1. The evidence at trial is described in detail in the court of appeals' opinion. Pet. App. 3a-15a. From 1983 to 1985, petitioner Woods was a member of the Pittsburgh, Pennsylvania, City Council, and chairman of its Finance Committee. He was elected to serve as Council President in 1985 and as President Pro-Tem in 1987. He also served as a member of the Board of Directors of the Pittsburgh Housing Authority. *Id.* at 4a.

In the early 1980s, Joseph Wozniak, who sold weatherproofing products to the Housing Authority, agreed to "kick back" to Woods approximately 10% of the gross revenues Wozniak realized from the sale of his products to contractors for Housing Authority projects. Wozniak understood that if he did not make the kickback payments, the Housing Authority would stop using his products. In addition, Woods and Wozniak agreed that, in return for the kick-

backs, Woods would use his influence in "opening up doors" for Wozniak at other municipal agencies. Eventually, Woods' share was increased to 25% of Wozniak's gross sales, Pet. App. 3a-4a. In all, Wozniak paid at least \$35,000 to Woods as part of their arrangement, mostly by way of checks made payable to third parties in order to disguise the nature of the payments. *Id.* at 4a-8a.

During the period he was dealing with Wozniak, Woods entered into a similar relationship with petitioner Hartman, the president of Ablebuilt Co., which was in the business of constructing and renovating housing in Pittsburgh, including projects for the Housing Authority and the Urban Redevelopment Authority. From March 1984 to March 1986, Woods received payments of at least \$22,000 from Hartman. In return for those payments, Woods exercised his influence in securing early progress payments on Ablebuilt's work for the Housing Authority, in helping Ablebuilt in its contract negotiations with the Redevelopment Authority, and in licensing Hartman's brother as a city electrician. The payments were made from the proceeds of checks issued to one of Ablebuilt's subcontractors, Louis Billota, who acted as an intermediary between Hartman and Woods. Pet. App. 8a-15a.

2. On appeal, petitioners contended that the "pattern of racketeering activity" element of RICO is unconstitutionally vague.<sup>1</sup> The court of appeals re-

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<sup>1</sup> The principal substantive provision of RICO, 18 U.S.C. 1962(c), prohibits a person employed by or associated with a RICO enterprise from conducting or participating in the enterprise's affairs "through a pattern of racketeering activity." The statute provides that such a pattern "requires at least two acts of racketeering activity" committed within ten years of each other. 18 U.S.C. 1951(5).

jected that contention. It began by noting that outside of the First Amendment context, a party may challenge a statute for vagueness only on the basis that the statute is vague as applied to the party's conduct in a particular case. In light of petitioners' failure to claim that their RICO prosecution implicated any constitutionally protected conduct, the court viewed petitioners' challenge as confined to a claim that the statute was vague as applied to them. Pet. App. 17a.

Examining petitioners' conduct, the court concluded that RICO's "pattern of racketeering activity" element was not vague as applied to this case. The court noted that under this Court's decision in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 109 S. Ct. 2893 (1989), the predicate acts of racketeering must be related to one another and amount to or pose a threat of continuing criminal conduct in order to constitute a "pattern." Pet. App. 17a-18a. Applying *H.J. Inc.*, the court found that the relatedness plus continuity test was "readily satisfie[d]" here. *Id.* at 19a. The court explained that each petitioner's acts of racketeering extended over a substantial period of time and involved the same methods, purposes, results, and participants. *Id.* at 19a-20a. The court concluded that, whatever might be true in other cases, the application of RICO to this "ongoing, hardcore political corruption case" should "not have come as a surprise to [petitioners]." *Id.* at 21a.

Petitioners also contended that the evidence failed to establish the requisite nexus between themselves, the RICO enterprise (the City Council), and the predicate acts of racketeering activity. Without discussion, the court of appeals rejected that contention (among others) as "clearly without merit." Pet. App. 22a.

## ARGUMENT

1. Petitioners renew their contention (Pet. 6-14) that the pattern of racketeering element of a RICO offense is unconstitutionally vague. They rely on the concurring opinion in *H.J. Inc.*, 109 S. Ct. at 2906-2909, in which Justice Scalia, joined by three other Justices, expressed doubts about whether the RICO "pattern" requirement could withstand a constitutional vagueness challenge. The court of appeals correctly rejected petitioners' challenge to RICO, and its holding is consistent with the holding of every other court of appeals that has considered that contention in the wake of *H.J. Inc.* See *United States v. Masters*, No. 89-2851 (7th Cir. Feb. 6, 1991), slip op. 6-7; *United States v. Glecier*, No. 88-3417 (7th Cir. Jan. 8, 1991), slip op. 2 n.1; *United States v. Coiro*, No. 90-1192 (2d Cir. Jan. 3, 1991), slip op. 7621-7622; *United States v. Angiulo*, 897 F.2d 1169, 1178-1180 (1st Cir.), cert. denied, 111 S. Ct. 130 (1990).<sup>2</sup>

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<sup>2</sup> Before *H.J. Inc.* as well, the courts of appeals had uniformly held that the RICO statute is not unconstitutionally vague. See, e.g., *United States v. Tripp*, 782 F.2d 38, 41-42 (6th Cir.) (reference to state law in predicate acts did not render statute vague), cert. denied, 475 U.S. 1128 (1986); *United States v. Ruggiero*, 726 F.2d 913, 923 (2d Cir.), cert. denied, 469 U.S. 831 (1984); *United States v. Martino*, 648 F.2d 367, 381 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982); *United States v. Morelli*, 643 F.2d 402, 412 (6th Cir.) (collecting cases), cert. denied, 453 U.S. 912 (1981); *United States v. Aleman*, 609 F.2d 298, 305 (7th Cir. 1979) (enterprise element), cert. denied, 445 U.S. 946 (1980); *United States v. Swiderski*, 593 F.2d 1246, 1249 (D.C. Cir. 1978) (RICO conspiracy), cert. denied, 441 U.S. 933 (1979); *United States v. Campanale*, 518 F.2d 352, 364 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976).

Petitioners do not argue that the “pattern of racketeering activity” element of RICO was vague as applied to them. To sustain such a vagueness attack, petitioners would have to establish that RICO fails to give a person of ordinary intelligence reasonable notice that his conduct is prohibited. See *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). This Court explained in *H.J. Inc.* that proof of a RICO pattern requires a showing that the predicate criminal acts bear a relationship to each other, in that the crimes are similar in purpose, result, participants, victims, methods of commission, or in other ways, and that there is continuity in the course of criminal conduct or a threat of continuity. 109 S. Ct. at 2901. Whatever ambiguity there may be at the margins, petitioners’ participation in this case of “ongoing, hardcore political corruption,” Pet. App. 21a, unmistakably satisfied the pattern requirement. Petitioner Woods “repeatedly solicited and accepted bribes in connection with public matters” over a period of four years; throughout that period, the bribery scheme exhibited similar “methods, purposes, results, and participants.” *Id.* at 19a. Petitioner Hartman’s conduct likewise reflected a clear pattern of continuing activity; he “bribed Woods on many occasions over an extended period” to obtain Woods’ influence in public construction projects in which Hartman was interested. *Id.* at 20a. On these facts, the court of appeals correctly concluded that “[t]he application of RICO to the activities of these defendants should not have come as a surprise to them.” *Id.* at 21a. See also *United States v. Pungi-*

tore, 910 F.2d 1084, 1105 (3d Cir. 1990), petition for cert. pending, No. 90-6524.<sup>3</sup>

Instead of contending that RICO is vague as applied to their own conduct, petitioners urge this Court to undertake a facial review of the constitutionality of RICO's pattern element. When constitutionally protected conduct is not implicated, however, this Court has consistently refused to consider vagueness challenges to statutes on the basis of facts not before the Court. See *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982) (a facial challenge to a criminal statute based on vagueness will be permitted only if the statute reaches "a substantial amount of constitutionally protected conduct"); *Kolender v. Lawson*, 461 U.S. 352, 358-359 n.8 (1983). Rather, the defendant must establish that the statute is vague as applied to the particular conduct with which he is charged. *Hoffman Estates*, 455 U.S. at 494-495 & n.7; *United States v. Powell*, 423 U.S. 87, 92 (1975); *Parker v. Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."). In each of the cases cited by petitioners in which the Court has held a criminal statute facially void because of vagueness (Pet. 11-12), the

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<sup>3</sup> In view of the fact that petitioners' RICO violations required the commission of at least two predicate acts of extortion and bribery—crimes that petitioners do not suggest are unduly vague—it is difficult to imagine how petitioners could have lacked fair notice that their conduct was prohibited. Cf. *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 57 n.7 (1989) ("[I]t would seem that the RICO statute [as applied to predicate acts of obscenity] is inherently less vague than any state obscenity law: a prosecution under the RICO law will be possible only where all the elements of an obscenity offense are present, and then some.").

statute implicated constitutional rights. See *Kolender v. Lawson*, *supra* (First Amendment rights); *Colautti v. Franklin*, 439 U.S. 379 (1979) (right to abortion); *Smith v. Goguen*, 415 U.S. 566, 574 (1974) (First Amendment rights); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (First Amendment rights).<sup>4</sup>

There is no contention in this case that RICO implicates constitutionally protected conduct; indeed, petitioners disclaim that suggestion and purport to make "a pure due process attack" based on their view that RICO is not sufficiently clear. Pet. 11. But petitioners offer no reason for the Court to depart from its practice of evaluating vagueness challenges in a factually concrete setting, rather than abstractly canvassing all conceivable applications of a statute. It would be particularly inappropriate to do so for RICO, in light of this Court's expressed preference for fleshing out the pattern requirement "in the context of concrete factual situations presented for decision." *H.J. Inc.*, 109 S. Ct. at 2902.

Contrary to petitioners' suggestion (Pet. 12), a facial challenge is not necessary to fulfill the goal of giving sufficient guidance to law enforcement officials in order to prevent arbitrary enforcement of RICO. Cf. *Kolender*, 461 U.S. at 357-358. As the

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<sup>4</sup> In *Giacco v. Pennsylvania*, 382 U.S. 399 (1966), the Court invalidated on due process grounds a statute that permitted a jury to impose costs on an acquitted defendant without any governing standards at all. Although the statute in *Giacco* did not regulate constitutionally protected primary conduct, *Giacco* is distinguishable from this case because the statute examined in that case was vague in all of its applications, including as applied to the particular defendant challenging it. Petitioners make no contention that RICO is vague as applied to them.

uniform rejection of vagueness challenges by the courts of appeals demonstrates, RICO does give adequate guidance to prosecutors; petitioners' case is no exception to that rule. If the danger of arbitrary enforcement of RICO exists, that contention can be addressed when it is raised by the facts of a particular defendant's case.

2. Petitioners also contend (Pet. 14-17) that review is warranted to clarify the standards governing whether a defendant has conducted the affairs of a RICO enterprise "through" a pattern of racketeering activity. They argue that on the facts of this case there was an insufficient "nexus" between the Pittsburgh City Council (the enterprise) and their predicate acts of racketeering to satisfy this requirement of RICO.<sup>5</sup>

The courts of appeals have employed different linguistic formulations to describe the appropriate test for determining whether a sufficient nexus exists between the charged enterprise and the predicate acts of racketeering. Some courts have applied a formulation originating in *United States v. Cauble*, 706 F.2d 1322, 1333 (5th Cir. 1983), cert. denied, 474 U.S. 994 (1985), that requires a showing, where the enterprise itself is not devoted to unlawful activity, that "(1) the defendant has in fact committed the racketeering acts as alleged; (2) the defendant's position in the enterprise facilitated his commission of the racketeering acts, and (3) the predicate acts had some effect on the lawful enterprise." See *United States v. Ellison*, 793 F.2d 942, 950 (8th Cir.)

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<sup>5</sup> The statute requires proof that the defendant conducted or participated in the enterprise's affairs "through" the pattern of racketeering; this requirement is often called a "nexus" requirement. 18 U.S.C. 1962(c).

(same), cert. denied, 479 U.S. 937 (1986); *United States v. Blackwood*, 768 F.2d 131, 138 (7th Cir.) (same), cert. denied, 474 U.S. 1020 (1985); *United States v. Pieper*, 854 F.2d 1020, 1024 (7th Cir. 1988) (same).

Since *United States v. Scotto*, 641 F.2d 47, 54 (1980), cert. denied, 452 U.S. 961 (1981), the Second Circuit has used a different formulation of the test. It has treated the nexus requirement as requiring the government to show either that (1) the defendant was "enabled to commit the predicate offenses" solely because of his position in, involvement with, or control over, the enterprise's affairs, or (2) "the predicate offenses are related to the activities of the enterprise." See *United States v. Simmons*, No. 88-1504 (2d Cir. Jan. 11, 1991), slip op. 1267-1268 (collecting cases); see also *United States v. Yarbrough*, 852 F.2d 1522, 1544 (9th Cir. 1988) (applying *Scotto*). The Third Circuit, in prior cases, has cited the *Scotto* formulation with approval. *United States v. Jannotti*, 729 F.2d 213, 226 (3d Cir.), cert. denied, 469 U.S. 880 (1984).

As a practical matter, it is far from clear that the two approaches lead to different results in particular cases; we are not aware of any such conflicts. Even as a theoretical matter, the two stated tests are not incompatible, because the formulations in *Cauble* and *Scotto* do not appear to express different substantive requirements. To begin with, it is difficult to conceive of instances in which a defendant's predicate acts were "related" to the enterprise's activities or enabled by the defendant's position in it, as *Scotto* requires, yet were not facilitated by the defendant's association with the enterprise and did not have an effect on the enterprise, as required by *Cauble*. Moreover, the principal purpose of the test announced in

*Cauble* is to ensure that a defendant is not held to have conducted the affairs of a legitimate business "through" racketeering activity simply because the "defendant works for a legitimate enterprise and commits racketeering acts while on the business premises." 706 F.2d at 1332. The Third Circuit has expressly acknowledged the validity of that concern, *United States v. Jannotti*, 729 F.2d at 226, and has accommodated it within the framework of the *Scotto* approach.<sup>6</sup>

In any event, the evidence in this case satisfied the nexus test regardless of the formulation applied.<sup>7</sup> The evidence clearly demonstrated that Woods' position on the Pittsburgh City Council facilitated his bribery scheme and that it affected the Council's functions. Woods' very ability to obtain business for Wozniak and Hartman from various public and quasi-public agencies derived from his membership on the City Council, which had the responsibility of authorizing expenditures for city projects and over-

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<sup>6</sup> The absence of any substantive difference between the standards is illustrated by *United States v. Carter*, 721 F.2d 1514, 1527 & n.16 (11th Cir. 1984), where the court expressly declined to determine whether the *Cauble* formulation or some other test was appropriate, but held that *Cauble* would be satisfied, and the requisite nexus established, when a defendant routinely employed a legitimate enterprise's resources "to make possible the racketeering activity."

<sup>7</sup> The sufficiency of the evidence is the only issue that petitioners preserved for review. Hartman requested a jury instruction on the nexus issue, which the district court agreed to give "in other words." X Gov't C.A. App. 2767. The court then gave an instruction, *id.* at 2941, to which petitioners made no objection before the jury began its deliberations as required by Fed. R. Crim. P. 30. Nor did petitioners challenge the jury instruction in the court of appeals, where they argued only that the evidence was insufficient to establish a nexus. Pet. App. 21a.

seeing city agencies generally.<sup>8</sup> Petitioners argue (Pet. 16) that it was Woods' position on the Board of Directors of the Housing Authority that was of value to Hartman, not his seat on the City Council. But petitioners overlook that one seat on the Board of Directors of the Housing Authority is required under local law to be held by a councilman, and Woods held his board seat while a member of the Council. II Gov't C.A. App. 423, 448. The Council therefore played an integral role in the Housing Authority's management, and Woods' crimes undermined the Council's ability to carry out that role. Petitioners also overlook that Woods corruptly assisted Hartman in connection with contracts with the Urban Redevelopment Authority, which depended on the Council for funding and approval of its property transactions. Pet. App. 10a. When a city councilman solicits bribes for influencing the award of city contracts by city agencies, he necessarily impairs the Council's fulfillment of its responsibility to protect the city against corruption in the conduct of city government. In sum, because petitioners' conduct satisfied the nexus requirement under the tests applied in all circuits, this Court's review is not warranted.

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<sup>8</sup> For example, the director of the Three Rivers Stadium Authority testified that he agreed to meet with Wozniak at Woods' request because Woods had been supportive of the Stadium Authority on the City Council. IV Gov't C.A. App. 880. And the Executive Director of the Allegheny County Sanitation Authority, who arranged at Woods' request to purchase Wozniak's product, noted that, as city councilman from the Northside, Woods had more impact on the operation of the Sanitation Authority than the average councilman. *Id.* at 932.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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